91-1647

CASE NO. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN SUPE, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

JAMES M. CAMPBELL
Attorney at Law
29 East Pine Street
Orlando, FL 32801
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Attorney for Petitioner
Fla. Bar No. 0154053

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JAMES M. CAMPBELL
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Attorney for Petitioner
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QUESTIONS PRESENTED FOR REVIEW

1. May State authorities which referred a case for Federal prosecution reactivate a previously filed and abandoned State prosecution upon a ruling by the Federal Court that key evidence must be suppressed and then relitigate the identical suppression issues in State Court?

2. Once a Defendant establishes a prima facia case that the state prosecuting authority referred a case for federal prosecution and abandoned the State prosecution in deference to the Federal prosecution, does the burden of proof shift to the state to adduce evidence that it was not in privity with the federal government so as to preclude the doctrine of collateral estoppel from barring relitigation in state court of

suppression issues decided in the Defendant's favor by the federal court in a federal prosecution abandoned after entry of the suppression order.

PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

STEPHEN SEPE

STATE OF FLORIDA

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CASE NO. _____

IN THE
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UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF THE
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JURISDICTIONAL STATEMENT

Stephen Sepe (hereinafter, Sepe) seeks review of a Judgment of the Fifth District Court of Appeals of the State of Florida, entered November 13, 1991, affirming his criminal conviction on the charge of Trafficking in Cocaine. Sepe timely filed a "Motion For Rehearing

and/or Rehearing En Banc" on November 27, 1991, and this Motion was denied on January 10, 1992. The Judgment of the Fifth District Court of Appeals of the State of Florida is not subject to review by the Florida Supreme Court, and it is a decision of a state court of last resort. The State Court's Judgment has decided important questions of federal law which have not been, but should be, settled by this Court. This Petition is timely filed pursuant to Rule 20, S.Ct.R., within 90 days after entry of the State Court's ruling denying Sepe's timely Motion For Rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

STATEMENT OF THE CASE

This case involves successive federal and state drug prosecutions against Sepe for possession of drugs uncovered in his apartment by municipal law enforcement authorities executing a search warrant issued by a county court judge. The instant search warrant was issued on September 22, 1989 pursuant to the Affidavit of Detective Gordon Gibb of the Altamonte Springs Police Department. The search warrant was a product of an investigation conducted without any involvement by federal authorities.

Believing that the warrant was a "no-knock" warrant, Detective Gibb and other municipal police officers executed the warrant near midnight on September 22, 1989 by using a battering ram on Sepe's apartment door without first

announcing their presence. The resulting search of Sepe's apartment uncovered a quantity of drugs, and Sepe was charged by Information in Florida State Court on September 27, 1989 with Possession of Cocaine and Cannabis. On October 20, 1989, the State Court entered an Order scheduling the trial of the case for January 2, 1990.

In November 1989, the United States filed an Indictment against Sepe charging him with Possession of Cocaine with Intent to Distribute. On or about November 28, 1989, the State authorities prepared a document captioned "In Re: Search Warrant for 345 #103 Lakepointe Drive, Altamonte Springs, Florida, residence of Stephen Sepe" and this document was filed under the case number of State prosecution then pending against Sepe.

This document was a "Motion For Release of Cassette Tape", and it requested the State Court to release an evidentiary cassette tape for use in the federal prosecution. That Motion stated as follows:

> "There are currently no state charges pending against Mr. Sepe because the United States Attorney's Office has indicted him in Federal Court. The United States Attorney's Office has requested the return of the cassette tape so that they may prepare their case."

As of the filing by the State authorities of their "Motion for Release of Cassette Tape", the only activity in the State prosecution had been the filing of an Information and the issuance of a Court order scheduling the case for trial. There was no further activity in the state prosecution until after all seized

evidence was suppressed by the Federal Court.

In January 1990, Sepe filed a Motion To Suppress in the Federal prosecution. On February 2 and February 5, 1990, the Federal court conducted a lengthy evidentiary hearing on the suppression motion. On June 6, 1990, the Federal court issued a ten (10) page opinion ruling that all of the evidence seized during execution of the state warrant for Sepe's apartment must be suppressed. The basis of the ruling was that the actions of the State law enforcement authorities in executing the warrant violated both state and federal knock and announce statutes. On August 14, 1990, the Government filed an "Order For Dismissal" pursuant to Rule 48a

Fed.R.Crim.P. dismissing without prejudice the indictment against Sepe.

As the federal prosecution terminated, the Florida State authorities reactivated the State prosecution of Sepe. On August 3, 1990, Sepe filed in State Court a Motion to Suppress raising grounds identical to those addressed by the Federal Court and specifically referring to the June 6, 1990 Federal Court order suppressing the evidence on those grounds. Sepe also made a Motion In Limine, argued on August 10, 1990, maintaining the Federal decision on suppression issues preempted the State Court's authority on those matters, and arguing that the state was collaterally estopped from relitigating in State Court issues identical to those already ruled upon by the Federal Court. Sepe also filed

a Motion To Dismiss arguing that collateral estoppel prevented a State prosecution based entirely upon seized evidence suppressed in an identical federal prosecution.

The State Court denied Sepe's motions and, contrary to the Federal Court's disposition of the issues, declined to suppress the evidence seized from Sepe's apartment. Sepe entered a plea of guilty to the State charges expressly reserving his right to appeal the State Court's rulings on the above referenced pretrial motions. Sepe timely pursued an appeal to the Florida Fifth District Court of Appeals, which affirmed, without opinion, his conviction on November 13, 1991. Sepe's timely Motion For Rehearing was denied on January 10, 1992.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

This case presents a scenario of unabashed forum shopping by State authorities for a favorable ruling on suppression issues. The records clearly reflects that the State prosecuting authority made an initial decision to abandon the State prosecution and obtain the release of evidence by the State Court for use by federal prosecuting authority. Since there had been absolutely no federal involvement in this routine "street level" drug case prior to the filing of the federal indictment, and since the case agent assigned to the Federal prosecution was a municipal policeman, it is clear that the State authorities referred this case for a federal prosecution. It is equally clear that, under the Petit

policy, the federal government would not have initiated its prosecution of Sepe without first having received administrative assurances from the State prosecuting authority that the State would not prosecute for the same activity.

Both the Federal and State prosecutions hinged entirely upon the evidence seized from Sepe's home pursuant to the State policeman's execution of the warrant entered by a State judge. Immediately upon suppression of the evidence by the Federal Court, the Federal authorities dismissed their prosecution and the State authorites revived their previously abandoned case. Upon the State Court's denial of Sepe's pretrial motions seeking to prevent the State court from relitigating the suppression issues previously addressed by the Federal Court,

Sepe plead guilty and reserved his rights to appeal.

Historically, this Court jurisprudence has shown great deference to the independent sovereignty of the various states. For instance, this Court has ruled that the double jeopardy clause does not preclude dual Federal and State prosecutions for he same acts when the acts violate both Federal and State law because each sovereign has the independent authority to punish violations of its laws. See United States v. Wheeler, 345 U.S. 313 (1978). Such dual prosecutions, however, have previously been rare due, in part, to the Federal government's policy of not pursuing criminal charges against a defendant for acts which are the subject of the state prosecution. See U.S. Department of Justice, United

States Attorney's Manual, TIT. 9 Section 2.142; Petite v. United States, 361 U.S. 529 (1960).

The general principle of "dual sovereignty", granting complete independence to federal and state prosecutions, is not without limitations. For instance, in Bartkus v. Illinois, 359 U.S. 121 (1959), this Court held that successive prosecutions are barred where one prosecuting sovereign is acting as a "tool" of the other.

Of course, the double jeopardy clause is inapplicable to this case because jeopardy never attached in the federal prosecution. The lower federal courts, however, are increasing analyzing the issue of dual suppression hearings under the due process clause. As one Court has observed, "the due process clause,

unaided by the double jeorpardy clause, sometimes requires a state to apply collateral estoppel in favor of a criminal defendant. United States v. Davis, 906 F.2d 829 (2nd Cir. 1990).

The parameters of collateral estoppel in the context in dual suppression hearings, as noted by the Second Circuit, In Davis supra, "seems largely to be an open question". Id. at 833. The various federal circuits addressing similiar issues, proceeding by analogy to criminal cases concerning double jeopardy issues and civil law governing collateral estoppel, have groped to define the parameters of collateral estoppel in the context of dual suppression hearings.

In United States v. Bonilla Romero, 386 F. 2d 39, 43 (1st Cir. 1987) cert. denied 109 S. Ct. 55 (1988), the Court

held that a state court's decision regarding the suppression of evidence will bind the federal government only if the federal authorities substantially controlled the state action or were virtually represented by the State prosecutor. The Second Circuit in Davis supra, attempting to define what it referenced as the "ambigious contours" of this issue, held that "at a minimum, it must be shown that federal prosecutors actively aided the state prosecutors during the local suppression hearing". Id. at 935. See also, United States v. Reagan, 528 F.2d 1262 (2nd Cir. 1975); United States v. Sutherland, 929 F.2d 765 (1st Cir. 1991)

Issues surrounding dual federal and state suppression hearings are ripe for this Court's review and require

clarification and guidance to the lower federal and state courts. These issues are particularly prone to arise in drug cases, where a single event of possession invariably constitutes both a federal and state drug offense. State authorities, eager to obtain the leverage over a defendant provided by enhanced federal drug penalties often are tempted to forward the results of a state investigation to the federal authorities for prosecution. In cases, such as the instant case, with the ultimate outcome depends entirely upon the Court's resolution of suppression issues, a state referral for federal prosecution essentially gives the state authorities "two bites at the apple". If a federal court suppresses the evidence, the state merely has to reactivate an identical

state prosecution to trigger a reconsideration of the suppression issues by a state court.

Analyzing these scenarios exclusively under the "dual sovereign" principle has no relation to reality. A state's decision to refer the results of a state investigation for federal prosecution is nothing more than a litigation strategy. It is an unwritten rule in the state's Rules of Criminal Procedure which afford the state authorities a virtually unqualified right to two suppression hearings. In order for a state to prevail on suppression issues, it has only to convince either a federal or state judge of the merits of its position. In order for a defendant to prevail on suppression issues, it must

convince both a federal judge and a state judge of the merits of his position.

Affording the state the exclusive opportunity to trigger two suppression hearings grants the state procedural advantages which are not available to a defendant. In Wardius v. Oregon, 412 U.S. 470 (1973), this court held that due process require a balance of forces between the accused and accusor, and that a state may not employ a procedure for requiring defendants to provide notice of an alibi defense without also employing a reciprocal procedure for the defendant to obtain discovery from the state. Since a defendant has no mechanism available to him through which to trigger a full pretrial adversary hearing on suppression issues before both federal and state courts, a state's actions in triggering

such hearings clearly implicates due process guarantees.

As suggested in Wardius supra, the proper test in "dual suppression hearing" cases need not entail a showing of involvement by state authorities in the initial federal suppression hearing. Once a state refers the results of a purely state investigation to federal authorities for a federal prosecution, the federal government's acceptance of the referral is conditioned, under the Petit policy, upon the absence of a simultaneous state prosecution. Thus, a state making such a referral to federal authorities necessarily manifests the intent to abandon state prosecutions. Once a state, dissatisfied with the results of the federal suppression hearing, reactivates an abandon state

prosecution, the state has created for itself a procedural mechanism of unilaterally triggering two suppression hearings before federal and state tribunals. At this point, the due process concerns articulated in Wardius come into play and operate and should operate to preclude the second suppression hearing without reference to the doctrine of collateral estoppel.

A second "open issue" inherent in the dual suppression hearing scenario concerns the parties' respective burdens of proof in litigating the applicability of collateral estoppel. A common thread running through the lower courts' decisions on this matter is the requirement of showing that the prosecuting authority (i.e. federal or state) wishing to trigger a second

suppression hearing made a conscious decision to have its interests represented by the prosecuting authority which conducted the first (i.e. federal or state) suppression hearing. Though the courts have not squarely addressed this issue, the courts' underlying assumption appears to be that the defendant shouldered the entire burden of proving the subjective decision making process of the respective federal or state prosecuting authorities.

Providing a defendant with due process protections against dual, or successive, suppression hearings when one of the prosecuting authorities makes a subjective decision to have its interests represented by another prosecuting authority, and then placing upon the defendant the entire burden of

proving this subjective decision making process, is a hollow protection. Under these parameters, it is not surprising that the lower federal courts invariably have upheld the constitutionality of the second suppression hearing because the requisite "showing" had not been made.

The decision making process of a state attorney's office typically occurs "behind the scenes" and is opaque to a defendant. A "criminal intake" division normally makes the decision regarding the filing of an information. Once an information is filed and a case is assigned to a division, a second assistant state attorney in the division where the case is pending has the responsibility for prosecuting the charges. Each of these divisions has a "division chief"

who supervises the assistant handling the case.

The investigating police officers may provide input, not only to the criminal intake division and the division where the prosecution is pending, but at any level of the state attorney's office wherein the officers have or can make contacts. Furthermore, the investigating police officers themselves have superiors whom, either known or unknown to the police officers, may provide input at any level within the state attorney's office.

The decision making processes within the state attorney's office are by no means consistent, even as a single case unfolds. This was clearly exemplified in the instant case. For instance, after an information was filed against Sepe

on September 28, 1989, and after the trial on that information had been scheduled by the court for January 2, 1990, an assistant state attorney, apparently unaware that the criminal intake division had filed an information which had been scheduled for trial, filed a document which, instead of bearing the caption State v. Sepe, was captioned, "In Re Search Warrant for 345 #103 Lakepointe Drive, etc." That document "was a Motion for release of cassette tape" and represented to the court that "there are currently no state charges pending against Mr. Sepe because the U.S. Attorney's Office has indicted him in federal court". The motion sought release of an evidentiary cassette tape because "the U.S. Attorney's Office has requested return of the cassette tapes so that they

may prepare their case". This motion, representing that there were no state charges pending against Mr. Sepe, was filed under the handwritten case number of the state prosecution which had been pending against Sepe for two months.

Discussions between a state attorney's office and a United States Attorney's office are equally beyond the reach of a criminal defendant. For instance, in the Orlando Division of the Middle District of Florida, where the first suppression hearing occurred in this case, the office is managed from Tampa, Florida, where the United States Attorney has his office. There is a hierarchy of prosecuting officials in Tampa, Florida, and a second hierarchy in Orlando, Florida. Discussions concerning a referral of a state case

for federal prosecution may occur with a multitude of federal officials at any level within these hierarchies in two cities. The defendant only knows the identity of the Assistant United States Attorney that ultimately is assigned to conduct the federal prosecution.

Requiring a defendant to pierce an administrative veil of both federal and state prosecuting authorities and lay bare the decision making process of prosecuting officials possibily unknown to the defendant as a pre-requisite to triggering due process protections against dual federal and state litigation of identical suppression issues is an impossible task. Even in states, such as Florida, where pretrial discovery depositions are available to a defendant, discovery typically is limited to the

deposition of witnesses with information "relevent to the offense" charged. Rule 3.220, Fla.R.Civ.Proc. Assuming that a benevolent state trial judge would allow a defendant sufficient discovery to trace the decision making process relevent to a previous referral for federal prosecution through a multitude of officials within the state attorney's office, the discovery necessary to unravel such matters, assuming that the work product privilege is held to be inapplicable and the discovery is permitted, would be so massive as to dwarf all other issues in the case - including the question of guilt or innocence.

Typically, all that a criminal defendant such as Sepe can establish is a referral by state authorities to federal authorities of a state investigation for

federal prosecution, a subsequent abeyance or abandondment of any state prosecution, and an immediate initiation or reactivation of the state prosecution upon suppression of key evidence by a federal court in the federal prosecution. A criminal defendant simply does not have the necessary tools at his disposal to make the vague "showings" required by the lower courts as a prerequisite to triggering due process protections through the collateral estoppel doctrine.

The obvious solution to this dilema of hollow due process guarantees is one which this court has embraced in analogous situations. While the decision making process of the state prosecuting authority may be opaque to a defendant, the state prosecuting authority is well aware of its own decision making processes. Once

a defendant make a prima facia showing that (1) the criminal case against him is the product of an investigation conducted exclusively by state law enforcement agents, (2) that the state prosecuting authority was aware of the investigation, (3) that the case was referred to the federal prosecuting authorities for prosecution, (4) that the state prosecuting authority took steps, such as securing evidence, to assist the federal prosecuting authorities, (5) that the state prosecuting authorities abandoned or held in abeyance state criminal charges during the federal prosecution, and (6) that the state prosecuting authorities immediately reactivated or initiated a state prosecution upon suppression of key evidence by the federal court, the

burden of proving a state's lack of intent to be represented by the federal prosecuting authorities should shift to the state prosecuting authority, which is in the best position to articulate its own subjective thought processes.

Such a result would be consistent with this court's ruling on analogous issues. For instance, in cases where a defendant proves an unlawful search by law enforcement authorities, the burden shifts to the state to prove that any evidence it seeks to introduce against the defendant was derived from a source independent of evidence tainted by the unlawful search.See, Wong Sun v. United States, 371 U.S. 471 (1963). Similarly, when a defendant has received immunity or provided information to the authorities in connection with a violation of his

Fifth Amendment privilege, the burden shifts to the state to prove that any evidence it seeks to introduce against the defendant was not derived from the information initially provided by the defendant. Id. The underlying rationale of these principles is that the state, and not the defendant, is the only party in a position to articulate the sources of the evidence it seeks to use against the defendant. Similarly, in this case and similar cases, only the state is in a position to unravel the administrative decisions relative to the dual prosecutions and dual suppression hearings.

CONCLUSION

For the reasons stated herein, this Court should issue a Writ of Certiorari and review the decisions below.

Respectfully submitted,

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Orlando, FL 32801
(407) 841 9860
Florida Bar No. 0154053

Attorney for Petitioner
STEPHEN SEPE

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN SEPE, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

APPENDIX
TO
PETITION FOR A WRIT OF CERIORARI

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IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

CASE NO. 89-2953-CF-B

STATE OF FLORIDA,

Plaintiff,

vs.

STEVEN ANTHONY SEPE,

Defendant.
_____/

ORDER DENYING DEFENDANT/STEVEN ANTHONY SEPE MOTION TO DISMISS

The Defendant, Steven Sepe, has been charged with trafficing cocaine and possession of a controlled substance. The State of Florida seeks to prosecute the Defendant on the same evidence that the Federal Court has already suppressed; and in which case, the charges have been subsequently dismissed. A motion has been filed by the Defendant seeking to dismiss the charges brought against

him by the Florida Courts. Sepe argues that as a matter of law, the State of Florida is bound by the Federal Court ruling, which suppresses the evidence and dismisses the Federal charges against the Defendant.

It is a general rule that a dismissal entered before an accused is placed on trial, for example, before he is called on to plead or before the Jury are impaneled and sworn, is not equivalent to an acquittal and does not bar a subsequent prosecution for the same offense. Buculo v. Adkins, 424 U.S. 641; 47 L.Ed 301.

In the present case the issue of the validity of the seizure of narcotics has not been determined in the State courts, but has been ruled to be improper by the Federal courts.

The State has the right to prosecute the Defendant under state law for charges rising out of the same transactions involving violation of Federal Drug Laws. The subsequent prosecution by the State Court does not amount to double jeopardy. Booth vs. State, 436 So.2d 36 (Fla.1983); Bernard v. State, 261 So.2d 133 (Fla. 1972).

IT IS ADJUDGED:

The motion to dismiss the charges brought by the State of Florida against the Defendant is hereby DENIED.

ORDERED AT Sanford, Florida this 21 day of September, 1990.

C. VERNON MIZE, JR.
CIRCUIT JUDGE

Copies furnished to:
State Attorney Office
James M. Campbell, Esquire
29 E. Pine Street
Orlando, FL 32801

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

CASE NO. 89-2953-CF-B

STATE OF FLORIDA,

Plaintiff,

vs.

STEPHEN ANTHONY SEPE,

Defendant.

_____/

MOTION IN LIMINE

COMES NOW, the Defendant, STEPHEN ANTHONY SEPE, by and through his undersigned attorney, and files this his Motion In Limine and would state:

1. That the State of Florida including any of their witnesses, be precluded from introducing or attempting to introduce or make reference to any evidence which was seized from the Defendant's apartment pursuant to a

State issued search warrant and was suppressed by the United States District Court in the Middle District of Florida. (copy of Memorandum Opinion and Order is attached hereto and incorporated herein)

2. That the Order of the Federal Court is binding upon the State Court.

WHEREFORE, the Defendant prays that this Honorable Court grant his Motion in Limine.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand/mail delivery to GERALD W. JONES, JR., Assistant State Attorney, 100 E. First Street, Sanford, Florida 32771, on this 28th day of September, 1990.

JAMES M. CAMPBELL, ESQ.
29 E. Pine Street
Orlando, Florida 32801
(407) 841-9860
Attorney for Defendant
Florida Bar No. 0154053

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

CASE NO. G89-2953-CFB

STATE OF FLORIDA,

Plaintiff,

vs.

STEPHEN SEPE,

Defendant.

_____/

ORDER ON MOTION

On hearing of this cause the following were present: Assistant State Attorney, Gerald Jones, and Defendant's Attorney, James Campbell. The Defendant was also present. The Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion In Limine is hereby denied.

ENTERED at Sanford, Seminole County, Florida, on this _____ day of January, 1991.

_____
CIRCUIT JUDGE

I CERTIFY that a copy of the foregoing Order was furnished by mail/delivery to the attorneys named above, Seminole County Jail, this 15th day of January, 1991.

_____
TRIAL CLERK

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1991

STEPHEN SEPE,

Appellant,

v. CASE NO. 91-305

STATE OF FLORIDA,

Appellee.
_____/

Decision filed November 13, 1991

Appeal from the Circuit Court
for Seminole County,
C. Vernon Mize, Jr., Judge.

James M. Campbell, Orlando, for Appellant.

Robert A. Butterworth,
Attorney General, Tallahassee,
and David S. Morgan,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

DAUKSCH, SHARP, W., and
GRIFFIN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

STEPHEN SEPE,

Appellant,

v. CASE NO. 91-305

STATE OF FLORIDA,

Appellee.
_____/

DATE: January 10, 1992

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING AND/OR REHEARING EN BANC, filed November 27, 1991, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY:_____
Deputy Clerk

(COURT SEAL)

cc: James M. Campbell, Esq.
Office of the Attorney General,
Daytona Beach

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIFTH DISTRICT

STEPHEN SEPE,

Appellant,

vs. CASE NO. 91-305

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING AND/OR REHEARING EN BANC

COMES NOW the Appellant, STEPHEN SEPE, by and through his undersigned attorney, pursuant to Rules 9.330 and 9.331, Florida Rules of Appellate Procedure, and request this Court rant rehearing and/or reharing en bacn and as grounds therefore states:

1. On November 13, 1991, this court issued its decision per curiam affirming the Appellant's conviction with no written reasons. In reaching

this decision, the Appellant asserts that this Court overlooked or misapprehended the facts of this case.

2. The undersigned counsel expresses a belief, based upon a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

3. The undersigned counsel likewise expresses a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the following decision os this Court and that a consideration by the full Court is necessary to maintain informity of decisions in this Court:

a. State v. Beney, 523 So.2d 744, (Fla. App. 5 Dist. 1988).

4. In reaching its decision, this Court may have misapprehended the facts of this case. While there were two titled issues on appeal, there were three separate arguments raised by the Appellant.

5. The Appellant asserts that the instant case is directly on point with State v. Beney. It should be noted that one of the very judges on the panel in Beney sat on the Appellant's panel. In Beney, this Court held in part:

> We agree that the affidavit implies direct knowledge rather than the second and third hand information actually relied on, which seriously impacts on the finding of probable cause.

In the instant case, there can be no question that the affidavit explicitly implied that Detective Gibb

had interviewed Steven Haas, when in fact Detective Gibb did not interview Haas, but rather was told by other officers who had interviewed Haas, that Haas had provided certain information about the illegal drugs located in Sepe's apartment. Furthermore, the alleged written statement made by Haas is highly suspect on its fact because it was not sworn to, it was unsigned, and a plain viewing of this written statement by the issuing magistrate would not reveal who in fact had written the statement.

The Affidavit of Detective Gibb also attaches a taped telephone conversation between Haas and the Appellant. Detective Gibb in his affidavit stated that during the telephone conversation, Haas asked Sepe if he (Haas) could come over and get

some more cocaine. The testimony of Detective Gibb during the suppression hearing reveals that Haas never asked Sepe if he could come over and get some more cocaine, but rather only if he could come over and get "some more". It was Detective Gibb's opinion that Haas was talking about cocaine. The issuing magistrate never listened to the tape recording and relied upon the Affidavit. In order to comply with the rules of particularity, Gibb sould have identified this as his opinion.

Accordingly, the Appellant asserts that Detective Gibb was required to state in his affidavit that he was relying on the information of other officers. See, Beney, at 475. Further more Detective Gibb admittedly made a false statement when he incorporated

in his affidavit that the taped telephone converstaion said one thing when it in fact never did.

There can be no question that under the Beney case, the foregoing statements were made either knowingly and intentionally or with reckless disregard for the truth. To hold otherwise would be in direct conflict with this Court's prior decision.

Other District Courts of Appeal have also passed judgment on cases directly on point with the instant case. See, Debord v. State, 422 So.2d 881, (Fla.App. 2 Dist. 1982); State v. Marrow, 459, So.2d 321 (Fla.App. 3 Dist. 1984).

6. The Appellant asserts that this Court overlooked and misapprehended the fact that the executing officers of the search warrant believed they

had a "no-knock search warrant" (R.47, 84-85). There is no such creature permitted under Florida law. The executing officers believed they had a "no-knock search warrant" and therefore, their state of mind had been predetermined when they entered Sepe's home without complying with Florida's knock and announce statute. While the executing officers are always subject to some degree of peril, the record evidence establishes that the officers in this case attempted to say the right things to avoid an outcome similiar to the one in United States vs. Sepe.

7. This Court's per curiam affirmance in the instant case ignores the issues of great public importance raised in the Appellant's case. While the Appellant has pointed to direct

conflict between the instant opinion and this Court's holding in State v. Beney, and the knock and announce issue, there remains a final and perhaps more significant issue.

The Appellant has asserted that the State trial court was prohibited from utilizing the same evidence which the federal court suppressed in United States vs. Sepe.

As a bit of history, the search warrant in the instant case arose out of a request for the warrant by "state" officers. there was not one iota of involvement by the federal government in this case. Only after the search warrant was served and contraband was obtained did the State of Florida seek the assistance of the federal authorities. In the federal prosecution,

the "state" officers were the case agents. There was no apparent involvement by the DEA or any other federal law enforcement agency. The State of Florida abated any intended prosecution in the State court and further, on November 28, 1989, upon Motion of the State of Florida, by the Office of the State Attorney, Judge Alan Dickey signed an Order directing that the cassette tape of the call between Haas and Sepe be turned over to the United States Attorney. In that Order, Judge Dickey specifically found that State of Florida did not plan a prosecution against Sepe. (R. 194). The fact that such a Motion was made establishes that the State of Florida knew of the federal prosecution and

intended the federal prosecution of Sepe to be the only prosecution.

During the pendency of the federal prosecution, no State action was taken against Mr. Sepe. Only after the evidence was suppressed in federal court did the State pick up prosecution of Sepe.

This Court's per curiam affirmance misapprehends the facts and misapplies the law. The State of Florida was a party in privy with the United States. Relitigation by the State of Florida is prohibited under the supplemental caselaw submitted simultaneous with this motion. This caselaw was otbained subsequent to oral arguement in response to Judge Sharpe's question as to whether or not the Appellant contended the State was bound by the prior federal order.

Unfortunately, this court rendered a quick decision, however, due to the decision not being a final decision, the Appellant has submitted the Supplemental authority to be reviewed in conjunction with this Motion. In conjunction with the Supplemental Authority provided to this court, the Appellant would show the Court that there is a line of federal cases which deal with the question of whether the federal government controls the state prosecution and therefore is collaterally estopped from relitigating a suppression motion which was granted in State court. In the case before this court, we have the opposite situation here and the following federal court cases should be read in such a context: United States v. Sutherland, 929 F.2d 765 (1st Cir.

1991); United States ex rel. DiGiangiemo v. Regan, 528 F.2d 1262 (1975); United States v. Bonilla Romero, 836 F.2d 39 (1st Cir. 1987); United States v. Land at 5 Bell rock Road, Freetown, Mass., 896 F.2d 605 (1st Cir. 1990); United States v. Davis, 906 F.2d 829 (2nd Cir. 1990); and Montana v. United States, 440 U.S. 147, 99 S.Ct. 970 (1979), 59 L.Ed.2d 210.

In citing the above cases, the Appellant would show the Court that in each one of these cases, the Federal courts had before it the issue of whether or not a State court suppression order is applicable to the federal prosecution under the Federal statutes. These questions are determined on the facts of each case as to whether or not the federal government controlled or

participated in the State prosecution in varying context. In the case of United States v. Sutherland, the First Circuit Court of Appeals held that:

> "In this circuit it is well established that a ruling in a state prosecution will collaterally estop the federal government only if federal authorities substantially controlled the state action or were virtually represented by the state court prosecutor."

In the case of United States v. Land at 5 Bell Rock Road, Freetown, Mass., the First Circuit held that active participation by the federal government in the state court proceeding constituted a "laboring oar" in the state court litigation and was sufficient to activate the principles of collateral estoppel.

In the instant case, it can be clearly shown that the State of Florida assisted and aided the federal prosecutors in the prosecution of this case. On November 28, 1989, the Assistant State Attorney, Stephen E. Plotnick of the office of Norman R. Wolfinger, State Attorney, filed a Motion for Release of Cassette Tape which held:

> " COMES NOW the State of Florida and requests the Honorable Alan Dickey, to enter an order releasing the cassette tape in this case and as grounds states:
>
> 1. On September 22, 1989, the Honorable Alan Dickey, County Judge for Seminole County, Florida, signed a search warrant for the above-styled residence, which search warrant was executed that same day.
>
> 2. In the course of preparation of the affidavit for the search warrant a confidential informant made a phone call to the defendant

> Stephen Sepe which phone call was recorded on a cassette tape. This tape was provided to the Honorable Alan Dickey in conjunction with the affidavit.
>
> 3. There are currently no state charges pending against Mr. Sepe because the U.S. Attorney's Office has indicted him in federal court. The U.S. Attorney's Office has requested return of the cassette tape so that they may prepare their case.
>
> WHEREFORE, the State of Florida requests that the Honorable Alan Dickey, enter an ORDER releasing the cassette tape to Det. Gordon Gibb of the Altamonte Springs Police Department who is the main case agent in this investigation. (R. 193)

Pursuant to said Motion, an Order of Judge Alan Dickey was issued on the 28th day of November, 1989, which held as follows:

> "THIS CAUSE having come on to be heard upon

> the State's Motion For Release of Cassette Tape, and the Court having been fully advised in the premises and finding that no State case is pending or planned against the defendant, Stephen Sepe, but that there is a federal case against Mr. Sepe and there is no further need by this court for the cassette tape in question and that the United States Attorney has need for the cassette tape in the preparation of its case against Stephen Sepe it is hereby
>
> ORDERED that the Cassette Tape in the above-styled case be released to Detective Gordon Gibb of the Altamonte Springs Police Department.
>
> DONE AND ORDERED in Chambers, at Sanford, Seminole County, Florida, this 28th day of November, 1989." (R. 194)

As can be seen from the Motion and Order, the State of Florida was assisting the federal prosecutor in the prosecution

of Mr. Sepe in the federal court proceeding.

In addition to the above, the Record on Appeal clearly shows that the case was abated from the time that the federal court prosecution was commenced until after the decision of Judge Hoffman on the 6th day of June, 1990. After Judge Hoffman's ruling, the state court then activated the case and began the prosecution of Mr. Sepe.

In light of the above federal cases and in light of this Court's question of whether or not this Court is bound by the federal court decision, it appears that in the context of this case with Norman R. Wolfinger, State Attorney's Office assisting the federal prosecutor's in this case, that there is principles

of collateral estoppel which should be adopted by this Court because the State of Florida was in privity with the United States government in the case of United States of America v. Stephen Sepe.

WHEREFORE, the Appellant respectfully prays that this Honorable court grant the Motion for Rehearing or Rehearing En Banc for the reasons set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand/mail delivery to DAVID

S. MORGAN, Assistant Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114, on this 27th day of November, 1991.

JAMES M. CAMPBELL,ESQ.
Attorney for Appellant